



For a thriving New England

CLF New Hampshire 27 North Main Street
Concord, NH 03301
P: 603.225.3060
F: 603.225.3059
www.clf.org

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Frank L. Merrill, President
Silver Hill Development Corp.
619 Sand Road
Pembroke, NH 03275

Eaton W. Tarbell, Jr., Esq., Registered Agent
Silver Hill Development Corp.
45 Centre Street
Concord, NH 03301

Frank L. Merrill, Director
F.L. Merrill Construction, Inc.
619 Sand Road
Pembroke, NH 03275

Susan J. Merrill, Registered Agent
F.L. Merrill Construction, Inc.
619 Sand Road
Pembroke, NH 03275

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation ("CLF")¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act ("Clean Water Act," "CWA," or "Act"), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., part 135 (the "Notice") to the addressed persons of CLF's intention to file suit in United States District Court of the District of New

¹ CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Merrimack watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF's membership includes people who live in or near the Merrimack watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by the Facility's discharges of stormwater pollution to the receiving waters without a permit and in violation of the Clean Water Act.

Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is two-fold. First, F.L. Merrill Construction, Inc., d/b/a Pembroke Sand and Gravel, and Silver Hill Development Corp., d/b/a Pembroke Sand and Gravel (hereinafter, collectively, “Pembroke Sand and Gravel”) are discharging stormwater directly associated with the construction sand and gravel site at 830 North Pembroke Road, Pembroke, NH 03275 (the “Facility”), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Pembroke Sand and Gravel has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit² (“MSGP”) adopted by the Environmental Protection Agency (“EPA”) for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The Soucook River in the waterbody segment containing Frenchs Brook (Waterbody ID NHRIV700060202-20) is within the Merrimack watershed and flows into the Merrimack River. Pembroke Sand and Gravel discharges into the Soucook River and Frenchs Brook at Segment NHRIV700060202-20. The EPA has designated Segment NHRIV700060202-20 as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards.³ The Segment is impaired for mercury.⁴

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.⁵ Industrial activities, such as material handling and storage, equipment maintenance and cleaning, industrial processing, and other operations that occur at industrial facilities, may be exposed to stormwater.⁶ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.⁷

Pembroke Sand and Gravel is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2010, Pembroke Sand

² ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) [hereinafter MSGP], *available at* http://water.epa.gov/polwaste/npdes/stormwater/upload/msgp2015_finalpermit.pdf (last visited September 8, 2015).

³ See 33 U.S.C. § 1313(d).

⁴ http://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV700060202-20&p_cycle=2010 (last visited September 18, 2015).

⁵ See 40 C.F.R. § 122.26(b)(13).

⁶ See 40 C.F.R. § 122.26(b)(14).

⁷ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

and Gravel has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent (“NOI”) within ninety days after the initial issuance of the MSGP.⁸ On June 16, 2015, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2015 permit.

Pembroke Sand and Gravel has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, Pembroke Sand and Gravel is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

F.L. Merrill Construction, Inc., and Silver Hill Development Corp., both doing business as Pembroke Sand and Gravel, are the persons, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. F.L. Merrill Construction, Inc., and Silver Hill Development Corp. have operated the Facility since at least 2010 and F.L. Merrill Construction, Inc. currently advertises as the owner/operator of the Facility. F.L. Merrill Construction, Inc., and Silver Hill Development Corp. and their agents and directors, including but not limited to Frank L. Merrill (President of Silver Hill Development Corp. and Director of F.L. Merrill Construction, Inc.), have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the construction sand and gravel Facility located at 830 North Pembroke Road, Pembroke, NH 03275.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Pembroke Sand and Gravel has, and continues to, engage in “industrial activities,” and its operations fall under SIC Code 1442, within the meaning of 40 C.F.R. § 122.26(b)(14).⁹ Because the Facility has a primary SIC Code of 1442 and discharges stormwater associated with industrial activity, Pembroke Sand and Gravel is required to apply for, obtain coverage, and comply with the requirements of a National Pollutant Discharge Elimination System (“NPDES”)

⁸ EPA’s Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995, reissued in 2000, 2008, and 2015. *See* 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); 73 Fed. Reg. 56,572 (Sept. 29, 2008); 80 Fed. Reg. 34,403 (June 16, 2015). *See* MSGP parts 1.1 and 1.2.

⁹ *See* MSGP, Appendix D: Activities Covered, at D-3. Construction sand and gravel facilities identified by the SIC code 1442 are subject to the requirements of the MSGP for stormwater discharges.

permit such as the MSGP. Pembroke Sand and Gravel has failed to take any of these required steps.

Activities at the Facility include, but are not limited to: storing, moving, and processing sand, gravel, and other materials outside or otherwise exposing them to the elements; operating and storing heavy machinery and equipment outdoors; and driving vehicles on and off the Facility thereby tracking pollutants off-site. All of these activities at the Facility have contaminated the site with industrial pollutants.

Sand, gravel, and other materials; machinery and equipment; and vehicles at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over the sand and gravel piles; machinery and equipment; and vehicles, picking up dust, total suspended solids (TSS), total dissolved solids (TDS), fines, diesel/gas fuel, oil, heavy metals, trash, and other pollutants associated with the Facility's operations. The polluted runoff is then conveyed off-site into waters of the United States.

In addition, to the extent that Pembroke Sand and Gravel uses water in its industrial processes, including but not limited to washing gravel and crushed stone and spraying on rock crushing and sorting machinery, that water becomes "process wastewater" (also referred to as "process water") as defined in 40 C.F.R. § 122.2.¹⁰ Discharges of process wastewater are not covered under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. Discharges of process wastewater must instead be covered under an individual NPDES permit. CLF intends to pursue claims related to Pembroke Sand and Gravel's unpermitted discharges of process water to waters of the United States.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹¹ Pembroke Sand and Gravel discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facility into waters of the United States. Because Pembroke Sand and Gravel has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C.

¹⁰ Defining "Process wastewater" as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product."

¹¹ 33 U.S.C. § 1311(a).

§§ 1311(a) and 1342(p)(2)(B).¹² By failing to apply for and comply with the specific requirements of the MSGP, Pembroke Sand and Gravel is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1). In addition, unpermitted discharges of process wastewater constitute violations of 33 U.S.C. §§ 1311(a) and CLF puts Pembroke Sand and Gravel on notice that CLF intends to pursue claims related to Pembroke Sand and Gravel's unpermitted discharges of process water to waters of the United States.

a. Pembroke Sand and Gravel is discharging stormwater to waters of the United States without a permit.

Pembroke Sand and Gravel is an industrial discharger with a primary SIC Code of 1442 which means that pursuant to Section 402(p) of the Act, Pembroke Sand and Gravel is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because Pembroke Sand and Gravel has operated and continues to operate without a permit under Section 402(p), Pembroke Sand and Gravel is in violation of Section 301(a) of the Act.

In addition, during storm events, Pembroke Sand and Gravel's "industrial activities" at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches.¹³ There have been many such storm events since 2010. The Facility is generating pollutants from and through at least the following point sources: the sand and gravel piles that are open to the elements; the machines and equipment left outdoors, and the vehicles driving on and off the Facility, while additionally conveying pollutants through site grading, surface water channels, subsurface hydrological connections, detention ponds, culverts, and other conveyances to the Soucook River and Frenchs Brook.¹⁴ The Soucook River and Frenchs Brook flow into the Merrimack River, all of which are "waters of the United States," as defined in 40 C.F.R. § 122.2, and therefore, "navigable waters," as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

¹² See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as, *inter alia*, "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'").

¹³ See 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

¹⁴ These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. CLF specifically puts Pembroke Sand and Gravel on notice that the unpermitted stormwater discharges associated with industrial activity include discharges from the Facility areas specified in 40 C.F.R. § 122.26(b)(14). See also 40 C.F.R. § 122.2, which states that the definition of "discharge of a pollutant" "includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man[.]"

b. Pembroke Sand and Gravel is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

Pembroke Sand and Gravel is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.¹⁵ The Facility at 830 North Pembroke Road, Pembroke, NH 03275 has a primary SIC Code of 1442 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.¹⁶ Pembroke Sand and Gravel's failure to obtain coverage and comply with the permit is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.¹⁷

1) Pembroke Sand and Gravel Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to applying for coverage under the MSGP, Pembroke Sand and Gravel must develop and implement a Stormwater Pollution Prevention Plan ("SWPPP").¹⁸ The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.¹⁹ Pembroke Sand and Gravel has failed to develop and implement a SWPPP in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) Pembroke Sand and Gravel Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, Pembroke Sand and Gravel must submit a complete Notice of Intent ("NOI") to the EPA.²⁰ To complete the NOI, Pembroke Sand and Gravel is required to determine whether the body of water the stormwater is discharged to is an "impaired" water body, and whether the Facility discharges any specific pollutants listed on the NOI to that water body.²¹ The Soucook River and Frenchs Brook are classified as "impaired" waters.²²

¹⁵ MSGP part 1.1 and 1.2.

¹⁶ See MSGP part 1.1; MSGP part 8.J.

¹⁷ A thorough search of EPA's databases indicates that Pembroke Sand and Gravel has not filed an NOI for the Facility.

¹⁸ See MSGP part 5.

¹⁹ See MSGP part 5.2.

²⁰ See MSGP part 1.2.

²¹ See MSGP part 2.2.2.

²² See *supra* notes 3–6.

Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as verifying that no harm is done to a species in violation of the Endangered Species Act.²³ Pembroke Sand and Gravel has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Pembroke Sand and Gravel Must Take Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Pembroke Sand and Gravel must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. Pembroke Sand and Gravel must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.²⁴ These control practices must be in accordance with good engineering practices and manufacturer's specifications.²⁵ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.²⁶ Pembroke Sand and Gravel has failed to cover the materials and operations that may result in polluted stormwater runoff. Pembroke Sand and Gravel has not implemented the required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) Pembroke Sand and Gravel Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, Pembroke Sand and Gravel must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.²⁷ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.²⁸ These inspections must occur when the Facility is in operation.²⁹ The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.³⁰ Pembroke Sand and Gravel has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

²³ See MSGP part 1.1.4.5 and 2.3.

²⁴ See MSGP part 2.1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See MSGP part 3.1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

5) Pembroke Sand and Gravel Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Pembroke Sand and Gravel must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³¹ The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.³² An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.³³ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.³⁴ All monitoring data collected under the Permit must be reported to EPA. Furthermore, because the Soucook River and Frenchs Brook are “impaired waters” under 33 U.S.C. § 1313(d), Pembroke Sand and Gravel must monitor for all pollutants for which they are impaired.³⁵ Pembroke Sand and Gravel has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Pembroke Sand and Gravel Must Carry out the Required Reporting and Recordkeeping.

Pembroke Sand and Gravel must maintain and submit any and all required monitoring data.³⁶ Such monitoring data includes the following: an annual report to EPA which includes the Facility’s findings from the annual comprehensive site inspection and any documentation of correction actions;³⁷ an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;³⁸ and any other required reports under the MSGP.³⁹ Pembroke Sand and Gravel has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

³¹ See MSGP part 6.

³² See MSGP part 6.2.

³³ See MSGP part 6.1.1.

³⁴ See MSGP part 6.1.3.

³⁵ See MSGP part 6.2.4

³⁶ See MSGP part 7.1

³⁷ See MSGP part 7.5.

³⁸ See MSGP part 7.6.

³⁹ See MSGP part 7.7.

7) Pembroke Sand and Gravel Must Comply with the Requirements of MSGP Subpart J

Pembroke Sand and Gravel must also comply with the sector-specific requirements contained in Subpart J of the MSGP.⁴⁰ Subpart J requires construction sand and gravel facilities to implement additional technology-based effluent limits,⁴¹ meet additional SWPPP and inspection requirements,⁴² and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to construction sand and gravel facilities.⁴³ Pembroke Sand and Gravel must also minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes through various control measures such as permanent or semi-permanent covers or roofs, interceptor or diversion controls (e.g., dikes, swales, curbs, or berms); pipe slope drains; subsurface drains; conveyance systems (e.g., channels or gutters, open-top box culverts, and waterbars; rolling dips and road sloping; roadway surface water deflector and culverts); or their equivalents.⁴⁴ Pembroke Sand and Gravel has failed to comply with the requirements of Subpart J of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which Pembroke Sand and Gravel operates its Facility without permit coverage or discharges stormwater without a permit from the Facility is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Pembroke Sand and Gravel has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day since at least 2010 on which there has been a measurable precipitation event.

Each day on which Pembroke Sand and Gravel operates its Facility without permit coverage or discharges process water without a permit from the Facility is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

Every day, since at least 2010, on which Pembroke Sand and Gravel has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

⁴⁰ See MSGP, Appendix D, Table D-1, Sector J.

⁴¹ See MSGP parts 8.J.4; 8.J.5.

⁴² See MSGP part 8.J.6 and 8.J.7.

⁴³ See MSGP 8.J.8.

⁴⁴ See MSGP part 8.J.5.2.

These violations are ongoing and continuous, and barring a change in the stormwater management controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Pembroke Sand and Gravel is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects Pembroke Sand and Gravel to a penalty up to \$37,500 per day for each violation that occurred after January 12, 2009.⁴⁵ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Pembroke Sand and Gravel to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,



Zachary K. Griefen, Esq.

⁴⁵ 40 C.F.R. § 19.2



Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
zgrieffen@clf.org

cc:

Gina McCarthy
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

H. Curtis Spalding
Environmental Protection Agency
EPA Region 1 Administrator
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Tom Burack, Commissioner
New Hampshire Department of Environmental Services
P.O. Box 95
Concord, NH 03302